No. 82-1146

IN THE

Supreme Court of the United States

October Term, 1982

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., *et al.*,

Petitioners,

vs.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit.

MOTION OF THE FUND FOR CONSTRUCTION INDUSTRY ADVANCEMENT, CONSTRUCTION INDUSTRY ADVANCEMENT FUND OF SOUTHERN CALIFORNIA, AND THE SAN DIEGO CONSTRUCTION INDUSTRY ADVANCEMENT FUND TO FILE BRIEF AS AMICI CURIAE; BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Fund for Construction Industry Advancement ("FCIA"), the Construction Industry Advancement Fund of Southern California ("CIAF"), and the San Diego Construction Industry Advancement Fund ("SDCIAF") hereby move the Court, pursuant to Supreme Court Rule 36.1, for leave to file the accompanying brief as amici curiae in support of the Petition for Writ of Certiorari filed on January 7, 1983 in USSC No. 82-1146.

In support of this motion, FCIA, CIAF and SDCIAF state as follows:

1. This motion is necessitated by the failure, upon request, of Respondents National Constructors Association, *et al.*, to give written consent to the filing of a brief by the amici applicants herein. Petitioners National Electrical Contractors Association, *et al.* have consented to the filing of the accompanying brief. Their letter of consent has previously been filed with the Clerk of the Court.

2. FCIA is an industry advancement fund established in 1977 to promote the interests of those who participate in the construction industry. FCIA has approximately 4,000 actively contributing employer members. Its contributions for 1980 totalled approximately $870,000.00; its contributions for 1981 totalled approximately $1,160,000.00.

3. CIAF is an industry advancement fund established in 1972 to further the interests of those who participate in the construction industry. There are approximately 3,000 active contributors to CIAF. In 1980, their total contributions were approximately $713,000.00. In 1981, their total contributions were approximately $764,000.00.

4. SDCIAF is an industry advancement fund established in 1972 to promote the interests of those who participate in the construction industry. SDCIAF presently has approximately 900 members. SDCIAF received contributions in 1980 in excess of $500,000.00, and in 1981 in excess of $600,000.00.

5. The members of CIAF, FCIA and SDCIAF have an ongoing interest in the prosperity and well-being of the construction industry, and the preservation of competitive conditions in that industry. Though not created, operated and administered in the same manner as the industry ad-

vancement fund which is the focus of the present action,[1] they share a concern that such industry funds, created to preserve competitive conditions in the industry, not become a target for unnecessary antitrust litigation. They believe the holding of the Fourth Circuit Court of Appeals in this case is incorrect, and deserves review and reversal by this Court. Specifically, they believe the Fourth Circuit Court of Appeals has misapplied fundamental principles of antitrust law developed by this Court and has improperly applied a "per se" rule of antitrust liability to a hitherto unexamined contractual provision, without the benefit of trial on the significant issues of fact raised by the Petitioners.

They further believe that the sweeping language used by the Fourth Circuit Court of Appeals was unnecessary to its decision, and that it will provoke additional, unmeritorious antitrust litigation outside the context of the present case. They believe the decision of the Fourth Circuit Court of Appeals could be read to mean that any provision of a collective bargaining agreement not immediately concerned with wages, hours and working conditions constitutes illegal "price fixing" if it has any effect whatsoever upon the market price of goods and/or services. Such a rule would expose numerous provisions in thousands of collective bargaining agreements to antitrust scrutiny.

The amici are in a unique position to advise the Court because of their intimate familiarity with collective bargaining conditions in the construction industry.

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[1]Specifically, CIAF, FCIA and SDCIAF do not finance collective bargaining functions.

WHEREFORE, it is respectfully moved and requested that CIAF, FCIA and SDCIAF be granted leave to file the accompanying brief as amici curiae.

Dated: February 17, 1983.

Respectfully submitted,

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The Fund for Construction Industry Advancement, Construction Industry Advancement Fund of Southern California, and the San Diego Construction Industry Advancement Fund (the "Funds") hereby submit this brief in support of the Petition for Writ of Certiorari in No. 82-1146.

I.
INTEREST OF THE AMICI CURIAE.

A statement describing the Funds and their interest in this case is set forth in the preceding motion requesting leave to file this brief as amici curiae.

II.
SUMMARY OF ARGUMENT.

1. The Fourth Circuit Court of Appeals erred in applying a *per se* price fixing analysis to the facts of this case. While conceding that the present case is unique,[1] the Fourth Circuit has ignored this Court's prior warnings against using *per se* rules in areas of antitrust inquiry which have not yet been fully explored by the courts. The Fourth Circuit Court of Appeals also disregarded the long line of authorities from this Court and other courts which have tested alleged restraints of trade arising in the collective bargaining context under a "rule of reason" analysis, rather than through the application of *per se* rules designed to deal with traditional restraints of trade arising in a commercial context.

2. The Fourth Circuit Court of Appeals and the district court below erroneously resolved disputed issues of fact without the benefit of a trial, in contravention of the explicit provisions of the Federal Rules of Civil Procedure and controlling principles of federal case law. It was clear error for the courts below to permit this case to go to judgment without a full trial on the disputed issues of fact.

III.
STATEMENT OF FACTS.

The critical issues in this case turn on the interpretation of Article 6 of a national collective bargaining agreement ("the agreement") entered into in 1976 between the Na-

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[1]The Fourth Circuit's opinion admits that "On its particular facts, this is a case of first impression and as such we should be careful in applying the per se rule." *National Electrical Contractors Association, Inc. v. National Constructors Association* (4th Cir. 1982), 678 F.2d 492, 503, n.14, citing *Broadcast Music, Inc. v. CBS* (1979), 441 U.S. 1, 99 S.Ct. 1551, 1557. The opinion of the Fourth Circuit Court of Appeals is hereinafter cited, for brevity, as "*Cir. Ct. Op.*" The opinion of the U.S. District Court in *National Constructors Association, et al. v. National Electrical Association, Inc., et al.* (D. Md. 1980), 498 F.Supp. 510, is hereinafter cited, for brevity, as "*Dist. Ct. Op.*"

tional Electrical Contractors Association ("NECA") and the International Brotherhood of Electrical Workers ("IBEW"), which provided for the establishment of the National Electrical Industry Fund ("NEIF"). Article 6 states, in pertinent part:

> "The parties agree to the establishment of a legally constituted trust to be called the National Electrical Industry Fund.
>
> "All construction agreements in the electrical industry shall contain the following language:
>
> "Each individual employer shall contribute one percent (1%)* of the gross labor payroll to be forwarded monthly to the National Electrical Industry Fund in a form and manner prescribed by the Trustees no later than fifteen (15) calendar days following the last day of the month in which the labor was performed. Failure to do so will be considered a breach of this agreement on the part of the individual employer." *(An amount not to exceed 1% nor less than 0.2 of 1% as determined by each local chapter [of NECA] and approved by the Trustees.

The plaintiffs National Constructors Association, *et al.* (collectively "NCA"), Respondents herein, charge that the promulgation and implementation of this agreement constituted price fixing *per se* violative of §1 of the Sherman Act, 15 U.S.C. §1.

Though there were serious questions raised by the Petitioners about the interpretation of Article 6 of the agreement, and the economic effect such an agreement would have, the District Court and the Fourth Circuit Court of Appeals elected to dispose of the case on a "paper record," without benefit of trial. Because the acts of the Petitioners were deemed to be *per se* violations of the antitrust laws, neither Court believed it necessary to conduct any inquiry into the

actual economic effect of the challenged agreement, nor to determine, how, in fact, the agreement was actually interpreted and implemented. *Dist. Ct. Op.*, 498 F.Supp. at 537; *Cir. Ct. Op.*, 678 F.2d at 501.

IV.
REASONS THE PETITION SHOULD BE GRANTED.

A. The Fourth Circuit Incorrectly Applied the "Per Se" Rule Against Price Fixing to a Hitherto Unexamined Contractual Relationship, With Unknown Market Effects.

1. The Sherman Act Does Not Condemn All Restraints of Trade, nor All Agreements Which May "Fix" Prices.

Though the Sherman Act purports to condemn every contract or combination "in restraint of trade or commerce," it has long been recognized that only those restraints which have an actual effect upon commercial competition and/or which adversely affect the rights of consumers are within its purview. *See, e.g., Apex Hosiery Co. v. Leader* (1940), 310 U.S. 469, 60 S.Ct. 982; *Blue Shield of Virginia v. McCready* (1982), ___ U.S. ___, 102 S.Ct. 2540. Many types of "restraints" have been found to lie outside the scope of the Sherman Act, because they lack the required nexus with commercial competition. *See, e.g., Hunt v. Crumboch* (1945), 325 U.S. 821, 65 S.Ct. 1545; *State of Missouri v. National Organization For Women, Inc.* (8th Cir. 1980), 620 F.2d 1301, *cert. denied*, (1981) 449 U.S. 842, 101 S.Ct. 122.

The inquiry is not ended, however, by determining that a particular restraint is within the scope of the Sherman Act. Once it is clear that a given restraint is of the type to which the Act is to be applied, the court must determine whether it is a *per se* violation of the Act, or is to be analyzed under the "rule of reason." The determination that a particular

anticompetitive act is a *per se* violation of the Sherman Act is limited to those instances in which the courts have sufficient prior experience with the restraint to insure that it does, in fact, have the pernicious anticompetitive effects at which the Sherman Act was aimed:

> "It is only after considerable experience with certain business relationships that courts classify them as per se violations . . ." *United States v. Topco Associates, Inc.* (1972), 405 U.S. 596, 607-608, 92 S.Ct. 1126, 1133; *quoted with approval* in *Broadcast Music Co., Inc. v. Columbia Broadcasting System, Inc.* (1979), 441 U.S. 1, 9, 99 S.Ct. 1551, 1557.

The courts have consistently applied the *per se* rule to restraints which they find to constitute "price fixing." However, not every agreement which literally "fixes" prices is illegal; see *Broadcast Music Co., Inc. v. Columbia Broadcasting System* (1979), 441 U.S. 1, 99 S.Ct. 1551; *Appalachian Coals, Inc. v. United States* (1933), 288 U.S. 344, 53 S.Ct. 471.

> "As generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable . . . literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing' but they are not 'per se' in violation of the Sherman Act . . . Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label 'per se price fixing.' That will often, but not always, be a simple matter." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (1979), 441 U.S. 1, 9, 99 S.Ct. 1551, 1557.

Earlier decisions of this Court also support the view that "price fixing" is not always *per se* illegal.

In *Board of Trade of Chicago v. United States*, 246 U.S. 231, 38 S.Ct. 497 (1918), this Court refused to condemn a rule which "fixed" prices for the after-hours trading of commodities by a commodity exchange. This Court found that the principal purpose of the agreement was to reasonably regulate hours of trading; the "fixing" of prices was ancillary to the otherwise lawful purpose. Similarly, in *Appalachian Coals, Inc. v. U.S.*, 288 U.S. 344, 53 S.Ct. 471 (1933), this Court refused to find that the creation of a corporation by 137 producers of coal, to act as their joint selling agent to market coal at uniform prices, was unlawful price fixing. The Court noted that the bituminous coal industry was in a depressed condition, and that such a joint selling arrangement, though it might "fix" prices, would operate to preserve the industry and create an orderly market place.

No party to this litigation appears to dispute the fact that the conduct condemned by the courts below does not readily fit within any of the classic "price fixing" patterns. Yet neither court was hesitant to apply the *per se* rule against price fixing to the unique facts of this case.

This Court recently held that "[p]er se rules of illegality are appropriate only when they relate to conduct that is *manifestly* anticompetitive." *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977), 433 U.S. 36, 49-50, 97 S.Ct. 2549, 2558.[2] (Emphasis supplied.) Amici believe the Fourth Cir-

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[2]Lower courts have also recognized that *per se* rules are to be applied with caution:

> "A court will not indulge in this conclusive presumption lightly. Invocation of a *per se* rule always risks sweeping reasonable, procompetitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a 'naked restraint of trade with no purpose except stifling of competition.' " *Smith v. Pro Football, Inc.* (D.C. Cir. 1978), 593 F.2d 1173, 1181, quoting *White Motor Co. v. United States* (1963), 372 U.S. 253, 263, 83 S.Ct. 696."

cuit and the trial court ignored this fundamental principle in applying a *per se* rule to the facts of the present case.

As we discuss in detail, *infra*, it is far from clear that the agreement at issue in this case has any "anticompetitive" effects.

2. The Agreement at Issue in This Case Is Not a "Price Fixing" Agreement.

Amici recognize, as did the courts below, that "price fixing" may be accomplished by means other than the literal setting of prices; *see, e.g., United States v. General Motors Corp.* (1966), 384 U.S. 127, 86 U.S. 1321; *Catalano, Inc. v. Target Sales, Inc.* (1980), 446 U.S. 643, 100 S.Ct. 1925. The critical question is whether there is a direct restraint upon price competition. See *United States v. General Motors, supra; United States v. Parke Davis & Co.* (1960), 362 U.S. 29, 80 S.Ct. 503.

The Fourth Circuit Court of Appeals and the trial court below decided that the requisite effect upon price competition was self-evident in this case, and that the *per se* rule against price fixing should be applied without inquiry into the actual economic effect of the challenged restraint. *Cir. Ct. Op.*, 678 F.2d at 501. This is a startling and unsupportable position. The facts of this case, at least on the "paper record" before the Court, do not demonstrate clear damage to price competition. No contractor's bids are fixed, nor is any component of any contractor's bid fixed. The only effect which the challenged agreement has on price competition is to cause a contractor's gross labor costs to

be one percent higher than they otherwise would be.[3] The contractor's gross labor costs remain a function of the contractor's own decisions about labor staffing on its projects. Moreover, there is no demonstrable direct relationship between a contractor's gross labor cost and the contractor's total bid price. The bid price will necessarily include the contractor's estimated profit, a figure which may vary widely, depending upon the intensity of competition for the work sought, the financial risk involved in bidding on the work, and the amount of the contractor's resources which will be required to perform the work, if a contract is awarded. It is far from certain that the dollar amount of any specific bid will be affected by the imposition of the obligation to contribute to the NEIF.

The plaintiffs contend that construction consumers will be denied the benefit of lower bids on construction work as a result of the NEIF contribution obligation. It is simply not clear that this is so. If contractors who currently have no obligation to contribute to the NEIF have been enjoying higher profit margins on their work as a result, they may elect to absorb the extra cost of contributing to the NEIF, and lower their profit margins accordingly. There would be no net effect on price to the construction consumer.

This Court has previously rejected the claims of antitrust plaintiffs who assert that they were damaged by charges "passed on" by an intermediary; see *Illinois Brick Co. v.*

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[3]The mere fact that one component of a total price has been affected does not mean that illegal price fixing has occurred. For example, in *General Cinema Corp. v. Buena Vista Distribution Co.* (9th Cir. 1982), 681 F.2d 594, a federal appellate court rejected the contention that a film distributor had engaged in price fixing by requiring exhibitors to pay, as film rental, a stated percentage of the price of each ticket sold or a "minimum per capita amount." Though these practices had a clear and direct effect on the price the exhibitor would charge for tickets, the Court found that the rental scheme was not an illegal attempt to fix prices.

Illinois, (1977) 431 U.S. 720, 97 S.Ct. 2061. This Court's opinion in *Illinois Brick*, and its earlier decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* (1968), 392 U.S. 481, 88 S.Ct. 2224, specifically note the severe evidentiary problems which are created when one assumes that charges levied upon one party have any direct effect upon that party's subsequent dealings with another. The Court's reasoning in *Illinois Brick* highlights the critical reason why the economic analysis employed by the Fourth Circuit in this case should be rejected.

In any event, it seems obvious that no reasonable court could reach a conclusion about the impact which the challenged agreement would have on price competition, absent an inquiry into its actual market effect.[4] For this reason, imposition of the *per se* rule seems completely inappropriate.

3. The Challenged "Price Fixing" Provision Is Ancillary to an Otherwise Lawful Agreement With Pro-Competitive Purposes.

This Court has long recognized that some contractual provisions, which may literally "fix" prices, nevertheless do not violate the antitrust laws, because they are ancillary to the legitimate purpose of an otherwise lawful agreement.

For example, in *Appalachian Coals, Inc. v. United States* (1933), 288 U.S. 344, 53 S.Ct. 471, this Court refused to

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[4]Amici recognize that this Court has recently reaffirmed the application of the *per se* rule against price fixing in *Arizona v. Maricopa County Medical Society*, ___ U.S. ___, 102 S.Ct. 2466 (1982). This Court's decision in *Arizona* is not dispositive of the issues raised in this case, however. In *Arizona*, there was no serious question that the challenged practices did, in fact, "fix" some prices. For the reasons already noted, it is far from clear that the payments made to the NEIF have any significant effect upon price competition. Moreover, the *Arizona* case arose outside the collective bargaining context, so the Court was not faced with the resolution of potentially conflicting policies embodied in the federal and antitrust laws. See discussion, *infra*.

sustain a challenge to a combination of coal producers, who had agreed, through uniform contracts, to appoint one entity as a common selling agent, with power to control the price at which the producers' coal was sold. While recognizing the effect which the challenged combination would have on market prices, the Court held that the price-fixing provisions were merely ancillary to the purpose of the agreement. This Court noted:

> "A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities." 53 S.Ct. at 479.

Here, as in the *Appalachian Coals* case, the "price fixing" aspect of the agreement is merely ancillary to an otherwise legal agreement with pro-competitive purposes.[5]

As the dissent below recognized, the purpose of the NEIF was to eliminate the "free ride" enjoyed by contractors who garner the benefits of NECA's labor negotiations and dispute resolution mechanisms, but which bear no part of the cost thereof.

Numerous courts have recognized that the elimination of "free riders," who attempt to take advantage of services

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[5]Professor Sullivan has noted that certain types of activity which affect price are not appropriate subjects for *per se* analysis:

> "Suppose, for example, that the purpose and effect of a particular arrangement is to make a better market through the establishment of an organized exchange where all buyers and sellers operate, by standardizing the products to facilitate price comparisons, or by exchanging information in ways facilitating competition. These kinds of practices would affect price, but on our assumptions they would do so by making it more competitive; therefore, they ought not to be treated as per se invalid." Sullivan, *Handbook of the Law of Antitrust*, §74, p. 200 (West, 1977).

financed by their competitors, is a legitimate goal not violative of antitrust laws; see, e.g., *Com-Tel, Inc. v. Dukane Corp.* (6th Cir. 1982), 669 F.2d 404, 410; *Davis-Watkins Co. v. Service Merchandise* (6th Cir. 1982), 686 F.2d 1190, 1199-1200; *U.S. Trotting Association v. Chicago Downs Association, Inc.* (7th Cir. 1981), 665 F.2d 781, 789.

If all electrical industry contractors adopted the posture of Respondents, there would be no coherent pattern of collective bargaining and dispute resolution in the unionized electrical contracting industry. The opinions of the courts below do not suggest that the Petitioners were motivated by a desire to fix consumer prices or market shares, or to deprive consumers of the opportunity to obtain fully competitive bidding on their electrical construction projects.[6]

The Fourth Circuit suggests, incorrectly, that the effect of the agreement will be to "stabilize prices of NECA and non-NECA contractors." *Cir. Ct. Op.*, 678 F.2d at 501. In fact, the challenged agreement does not stabilize prices at all. It merely insures that similarly situated contractors will compete for electrical contracting work from a similar cost base, by eliminating the "free ride" that non-NECA contractors have enjoyed. There is no reason to suppose that this arrangement will cause the contractors to compete any less vigorously, in terms of price, for the available construction work.

Numerous lower court decisions have adhered to the recognized principle that provisions which fix or affect prices

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[6]Amici recognize, of course, that a benevolent motive will not save an otherwise unlawful restraint. However, as this Court recognized in *Appalachian Coals, supra*, the motive underlying a challenged restraint may play a role in determining whether it is violative of the antitrust laws. "With respect to defendant's purposes . . . good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences." *Appalachian Coals, supra*, 288 U.S. at 372, 53 S.Ct. at 478.

are not violative of the Sherman Act, where such provisions are ancillary to otherwise proper agreements; *see, e.g., Evans v. S.S. Kresge Company* (3d Cir. 1976), 544 F.2d 1184, 1190-93, *cert. denied*, (1977) 433 U.S. 908, 97 S.Ct. 1596 [department store owner's agreement with food store operator to require food store to sell products at specified prices was not a *per se* violation of the Sherman Act]; *Kestenbaum v. Falstaff Brewing Corp.* (5th Cir. 1975), 514 F.2d 690, *cert. denied*, (1976) 424 U.S. 943, 96 S.Ct. 1412 [brewer's restriction of the sales price of one of its distributorship franchises was not a *per se* violation of federal antitrust law]; *Sun Oil Company v. Vickers Refining Co.* (8th Cir. 1969), 414 F.2d 383 [agreement between petroleum supplier and distributor that distributor's price "will be no lower than the prices to branded jobbers of one or more of Vicker's principal competitors," did not constitute price fixing *per se* violative of the Sherman Act]; *Checker Motor Corp. v. Chrysler Corp.* (2d Cir. 1969), 405 F.2d 319, *cert. denied*, (1969) 394 U.S. 799, 89 U.S. 1595 [cash rebate paid by Chrysler to purchasers of Chrysler taxicabs from dealers was not *per se* violative of federal antitrust law]; *Denison Mattress Factory v. Spring-Air Co.* (5th Cir. 1962), 308 F.2d 403 [agreement between trademark owner and small manufacturers of mattresses under which manufacturers agreed not to discount prices of mattresses was not *per se* violative of antitrust laws]; *United States v. Columbia Pictures Corp.* (S.D.N.Y. 1960), 189 F.Supp. 153, 178 [arrangement affecting price which is "subservient or ancillary to a transaction which is itself legitimate" should not be analyzed under the *per se* rule].

In this case, it is clear that any "price fixing" effect is ancillary to a perfectly legitimate, pro-competitive purpose: distributing the costs of an extensive (and expensive) labor

relations program among all contractors who enjoy its benefits.

Moreover, even if the activities and purposes of the NEIF *were* to be considered anticompetitive in purpose or effect, the Fourth Circuit's opinion should not be permitted to stand. In extremely broad and imprecise language, the Fourth Circuit suggests that *any* provision of a collective bargaining agreement which is not sheltered by the non-statutory labor exemption and which may directly affect the price of goods and services, may be a *per se* violation of the Sherman Act. This is so, according to the reasoning of the Fourth Circuit, even though a challenged provision may be a permissible subject of collective bargaining. Such expansive dicta needlessly invites antitrust challenges to many different subjects of collective bargaining. Such challenges might be of limited concern if the collective bargaining parties were certain that the courts would apply the rule of reason to analyze antitrust claims of this type. But the approach adopted by the Fourth Circuit suggests that such collective bargaining parties, like the defendants in this case, might never have a chance to explain the reasons a particular provision was adopted. If a given practice can be "tagged" as price fixing, as a group boycott, or as some other *per se* violation of the Sherman Act, no factual inquiry will be permitted.

Such a doctrine will necessarily have a chilling effect upon the ability of collective bargaining parties to negotiate equitable agreements.

4. This Court and the Lower Courts Have Avoided the Application of Per Se Rules to Alleged Anticompetitive Restraints Arising in the Collective Bargaining Context.

This Court has long recognized the existence of a limited, "non-statutory" antitrust exemption for agreements relating to wages, hours and working conditions reached by parties

within a collective bargaining context; *see, e.g., Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975); *Amalgamated Meatcutters v. Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596 (1965). The courts below found the non-statutory exemption to be inapplicable to the present case, because the challenged agreement does not directly concern itself with wages, hours and working conditions.[7]

Each of the lower courts then proceeded to analyze paragraph 6 of the NECA-IBEW agreement, utilizing traditional antitrust rules developed in the general commercial context, without consideration of the special concerns which underlie a collective bargaining relationship.

This Court, and the majority of lower courts, have avoided the use of "rules of thumb" developed in commercial antitrust cases to claims arising in a collective bargaining context. For example, in *Connell, supra*, this Court remanded to the lower court for a determination of whether a union-employer agreement, found to be outside the non-statutory antitrust exemption, was violative of the Sherman Act. If this Court believed a *per se* approach was appropriate, surely it would have decided the issue, as the Fourth Circuit did here, on the "paper record" before it.

The majority of lower courts have *also* followed a "rule of reason" approach to analyzing restraints created through collective bargaining; see, *e.g., Larry V. Muko, Inc. v.*

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[7]The question of whether an agreement falls within the statutory or non-statutory exemption from the antitrust laws is, of course, analytically distinct from the question of whether the agreement constitutes an antitrust violation. See *Larry V. Muko, Inc. v. South Western Pennsylvania Building Construction Trades Council*, 670 F.2d 421, 426 (3d Cir. 1982), *cert. denied*, (1982) ___ U.S. ___, 102 S.Ct. 2294; *Smitty Baker Coal Company, Inc. v. United Mine Workers of America*, 620 F.2d 416, 426, n.25 (4th Cir. 1980), *cert. denied*, (1980) 449 U.S. 870, 101 S.Ct. 207.

Southwestern Pennsylvania & Building Construction Trades Council (3d Cir. 1982), 670 F.2d 421 *cert. denied*, (1982) ___ U.S. ___, 102 S.Ct. 2294; *Ackerman-Chillingworth v. Pacific Electrical Contractors Assn.* (9th Cir. 1978), 579 F.2d 484, 490 *cert. denied*, (1978) 438 U.S. 1089, 99 S.Ct. 872; *Berman Enterprises, Inc. v. Local 333, International Longshoremen's Assn.* (2d Cir. 1981), 644 F.2d 930, 936.[8]

In *Smitty Baker Coal Co. v. United Mine Workers of America*, 620 F.2d 416 (4th Cir. 1980), *cert denied*, 449 U.S. 870, 101 S.Ct. 207 (1980), the Fourth Circuit held that a protective wage clause entered into by a union and a multi-employer bargaining unit, which required the union to demand the same wage scale from all employers who were *not* members of the multi-employer bargaining unit, did not constitute a *per se* violation of the Sherman Act. The Court found that such an agreement would violate the Sherman Act only if the agreement was "rooted in an anticompetitive purpose." 620 F.2d at 431.

The trial court avoided the application of *Smitty Baker* in this case by finding that its holding was limited to cases in which *wages* were the subject of the agreement. While it may be conceded that the agreement challenged here does not *directly* concern wages, the concern which motivated the collective bargaining parties is identical to that of the parties in *Smitty Baker*, and the economic effect on market prices is far less.

The *per se* rule adopted by the Fourth Circuit, like that disapproved by this Court in the *Broadcast Music* decision,

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[8]Professor Handler has suggested that union-employer conduct "should be measured by the rule of reason in recognition of the peculiar labor relations context in which the restraint arises even if, in a non-labor context, similar conduct might be per se unlawful." Handler and Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 Col.L.Rev. 459, 511 (1981).

would be unruly in application. The holding of the Fourth Circuit could be read to mean that *any* provision of a collective bargaining agreement which had a demonstrable effect upon price competition would constitute price fixing *per se* violative of the Sherman Act, unless it is within the protection of the non-statutory exemption. This would leave no room whatsoever for the application of the "rule of reason" to the provisions of collective bargaining agreements, a result surely not supported by the prior decisions of this Court.

B. The Lower Courts Ignored Fundamental Principles of Federal Law Governing the Grant of Summary Judgment.

The most startling feature of the decision of the Fourth Circuit Court of Appeals is its affirmance of summary judgment in a case involving hotly disputed questions of credibility and contract interpretation. Amici believe that the Fourth Circuit has disregarded the fundamental requirements of Rule 56 of the Federal Rules of Civil Procedure, as well as accepted principles of federal case law, in approving the grant of summary judgment in a case such as this.[9]

Though there are many facts which were not in dispute in the trial court, the opinion of the trial court clearly shows that conflicting evidence was offered with regard to the

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[9]Amici are aware that cross-motions for summary judgment were filed in the District Court. The fact that Petitioners were seeking summary judgment as to their legal claims and defenses does not detract from the impropriety of granting summary judgment to the Respondents, given the complex factual matrix of this case.

The filing of cross-motions for summary judgment does not prevent the losing party from contending on appeal that there is a dispute as to material facts. See *U.S. Trotting Association v. Chicago Downs Association, Inc.*, (7th Cir. 1981) 665 F.2d 781, 785; *Case & Co., Inc. v. Board of Trade of City of Chicago*, (7th Cir. 1975) 523 F.2d 355, 360.

interpretation of paragraph 6 of the IBEW-NECA agreement, and its application. The District Court believed it was unnecessary to hold a trial to resolve these factual disputes, since it found that the evidence proffered by the defendants was less credible then that offered by the plaintiffs. *Dist. Ct. Op.*, 498 F.Supp. at 529-531. Such credibility determinations cannot properly be made without a trial on the merits.

Moreover, the very question giving rise to the application of the *per se* rule, *i.e.*, whether the imposition of an obligation to contribute to the NEIF would have a direct effect on price competition, was the subject of both factual and legal dispute. For some reason, neither the District Court nor the Fourth Circuit had any difficulty in forecasting the economic effect of paragraph 6, even though there had been no trial on the issue of how such a provision would actually affect market prices. *Dist. Ct. Op.*, 498 F.Supp. at 535-536; *Cir. Ct. Op.*, 678 F.2d at 501.

Furthermore, the defendants were not given the opportunity to demonstrate, by oral testimony, the existence of legitimate and pro-competitive purposes which would be served by the imposition of such a provision.

FRCP 56(c) permits the grant of summary judgment by a district court *only* when the submitted evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

One leading commentator has noted that antitrust actions "are by their very nature poorly suited for disposition by summary judgment." 10A Wright, Miller & Kane, *Federal Practice & Procedure*: Civil 2d §2732.1, noting Justice Clark's statement in *Poller v. Columbia Broadcasting Sys-*

tem, Inc. (1962), 368 U.S. 464, 473, 82 S.Ct. 486, 491 that "Trial by affidavit is no substitute for trial by jury."

It makes no difference that the District Court might believe, upon reviewing the documentary evidence, that plaintiffs' evidence was entitled to more credibility than that of the defendants. That issue is reserved to the trier of fact:

> "The burden on the nonmoving party is not a heavy one; he simply is required to show facts, as opposed to general allegations, that present a genuine issue worthy of trial." 10A Miller, Wright & Kane, *Federal Practice & Procedure*, §2727, p. 148 (West 1983); see also *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981).

On a motion for summary judgment, the burden of proof is always on the moving party, and all doubts must be resolved against the moving party; see *Adickes v. S.H. Kress & Co.* (1970), 398 U.S. 144, 157, 90 S.Ct. 1598, 1608. In the present case, it appears that the District Court found issues of credibility in the record, but elected to resolve those questions in favor of the *moving* party, simply because it believed that the evidence proffered by the defendants was (1) prepared at a time remote from the matters in issue; and (2) was internally contradictary and/or self-serving. *Dist. Ct. Op.*, 498 F.Supp. at 531. However accurate these observations of a paper record may be, they do not substitute for the observation of live witnesses at trial, nor do they allow the defendants their right, under recognized principles of due process, to a full trial on the merits.

On appellate review, the record must be read in the light most favorable to the party opposing the motion for summary judgment; see *Poller v. Columbia Broadcasting System, Inc.* (1962), 368 U.S. 464, 473, 82 S.Ct. 486, 491. Here, it appears that the Fourth Circuit adopted the same approach as the District Court, resolving issues going to the

weight and credibility of evidence in favor of Respondents. *Cir. Ct. Op.*, 678 F.2d at 500-502.

Moreover, this is a case involving important issues of public policy not previously examined. The lower courts have recognized that such cases are not suited to disposition by summary judgment, particularly where they involve the intersection of potentially conflicting federal labor and antitrust policies; see, *e.g.*, *Carroll v. American Federation of Musicians of U.S. and Canada* (D.C.N.Y 1964), 35 FRD 535, 539: "Issues of this importance should not be decided on summary judgment where, while the underlying facts may not be disputed, the inferences and findings necessary to resolve the case are in substantial dispute." See also *Swettlen v. Wagoner Gas & Oil, Inc.* (D.C. Pa. 1974) 369 F. Supp. 893 [issues of material fact precluded determination, on summary judgment, as to whether an agreement between a petroleum producer and a jobber constituted retail price fixing].

The Court should grant certiorari to vindicate the right of the defendants to a full trial on the controversial and novel issues of law and fact which are raised in the present case.

V.
CONCLUSION.

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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